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March 12, 2013

Patrick Keliher, Commissioner
Department of Marine Resources
#21 State House Station
Augusta, Maine 04333-0021

Re: Regulation of Saltwater Fishery under the Maine Indian Claims Settlement Acts

Dear Commissioner Keliher:

You have asked this Office for an Opinion regarding the State's regulatory jurisdiction over marine resources, in particular, whether the State has the authority to regulate Passamaquoddy tribal members who take saltwater fish, clams, scallops or elvers, and whether the Maine Indian Tribal-State Commission (MITSC) has a statutory role in resolving questions over saltwater fishing matters involving the Maine tribes. You have also asked about the effect of the 1776 Treaty of Watertown.

A reading of the statutes and the legislative history of the Indian Claims Settlement Acts leads to the conclusion that tribal members are subject to Maine's regulatory authority over marine resources to the same extent as other Maine citizens and that MITSC has no particular authority or role regarding saltwater fishing issues. In addition, the 1776 Treaty of Watertown is irrelevant to the saltwater fishery issues.

State Regulation of the Saltwater Fishery

Those who negotiated and drafted the Indian Claims Settlement Acts dealt directly with natural resources issues, which were a critical component of the negotiations, as fully documented in the legislative history. The issue of whether the tribes were subject to licensing and regulation regarding marine resources has also been addressed by the courts, and the Maine Legislature has exercised its authority in this area to enact statutes affording tribal members privileges not available to other Maine citizens.

Statutes. The United States Supreme Court has determined that Congress has plenary power to divest tribes of attributes of sovereignty. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). As a result of the lengthy negotiations leading up to the Settlement Acts, and with the

agreement of the Maine tribes, Congress specifically extinguished tribal aboriginal claims to Maine's marine resources. Title 30 M.R.S. § 6204 establishes that Maine tribes and their members, lands and *natural resources* are subject to Maine's civil and criminal jurisdiction "to the same extent as any other person or lands or land or other natural resources," "[e]xcept as otherwise provided in" the Maine Implementing Act. "Natural resources" includes fishing rights. 25 U.S.C. § 1722(b); 30 M.R.S. § 6203(3). The Maine Implementing Act was specifically "approved, ratified, and confirmed" by Congress in 25 U.S.C. § 1725(b)(1) (the Maine tribes, members, lands and natural resources "shall be subject to the jurisdiction of the State of Maine" as set forth in the Maine Act). Therefore, Congress confirmed Maine's regulatory jurisdiction over marine resources and extinguished any claims to those resources by the Maine tribes that are based upon ancient or aboriginal title or use.

There is nothing in the Maine Implementing Act that would limit state jurisdiction over marine resources or that would grant tribal members rights to those resources distinct from those enjoyed by other Maine citizens. For example, saltwater fishing is not considered an "internal tribal matter" under 30 M.R.S. § 6206(1), a provision which preserved tribal authority over tribal governance. *See Penobscot Nation v. Stiphon*, 461 A.2d 478 (Me.), *appeal dismissed*, 464 U.S. 923 (1983). Regulation of natural resources is *not* an internal tribal matter. *Maine v. Johnson*, 498 F.3d 37, 42-47 (1st Cir. 2007) (tribal resources are subject to Maine's regulatory jurisdiction).

Sustenance fishing rights were reserved to the tribes, but only on inland waters, 30 M.R.S. § 6207(4) & (9), within the reservations themselves. The right to "sustenance fishing" excludes commercial fishing, *see* Report of the Maine Legislature's Joint Committee on Indian Land Claims (109th Legislature, 2d Sess.) (1980) at 2, and does not allow unlicensed fishing in waters outside the reservations.

Legislative history. In an April 2, 1980, memorandum to the Legislature's Joint Select Committee on Indian Land Claims which is attached to the Committee's Report, Attorney General Richard Cohen addressed a direct question concerning "the effect of the settlement on State and Federal authority over coastal and marine waters." Attorney General Cohen explained that to the extent the Passamaquoddy Tribe owned coastal land at Pleasant Point Reservation it could enact shellfish conservation ordinances just as a municipality could, subject to the approval of the Commissioner of Marine Resources. Otherwise, "[t]he Tribes will have no other rights in coastal or marine resources other than any person or entity." *Cohen Memo*, at 9. The tribes were aware of this contemporaneous interpretation of the Settlement Acts and expressed no disagreement with it.

Marine resources activity under the Settlement Acts. After the 1980 Settlement Acts, Passamaquoddy tribal members sought and received licenses from the Maine Department of Marine Resources ("DMR") and were prosecuted for violating DMR laws and regulations in the same manner as other Maine citizens.

Prior Litigation. In 1996, 13 members of the Passamaquoddy Tribe brought a test case regarding Maine's jurisdiction over marine resources. The tribal members engaged in various

unlicensed and illegal activities, including clamming, taking urchins, scalloping, selling clams, taking clams from closed areas, taking undersized clams, and placing elver nets in violation of state regulations.

After reviewing extensive briefs by both sides, District Court Judge Romei concluded that the Passamaquoddy Tribe retained no aboriginal saltwater fishing rights after the Settlement Acts were enacted and that the Tribe's right to govern its own "internal tribal matters" did not encompass marine fishing rights. *State v. Beal* (1998). Similarly, in 2007 the federal appeals court ruled in *Maine v. Johnson*, 498 F.3d at 42-46, that Maine's environmental regulatory jurisdiction applies uniformly throughout the State and that it covers Maine's tribes and tribal lands and waters.

State legislation following the Settlement Acts. The 1998 court decision prompted a legislative effort by the Passamaquoddy Tribe to obtain saltwater fishing privileges that would be unique to its members, in the form of a bill sponsored by then Passamaquoddy Tribal Representative Fred Moore. 1997 LD 2145. After several necessary redrafts, the bill was enacted. P.L. 1997, c. 708. The new law provided that the Tribe could issue special licenses and permits to its own members to take marine resources for commercial purposes, for sustenance and for tribal ceremonies, in accordance with certain specified terms. Otherwise, tribal members continued to be treated the same as other Maine citizens. This law was enacted like any other statute and may be amended or repealed or kept on the books like any other legislation in accordance with the will of the Legislature.

MITSC's Role Regarding the Saltwater Fishery

The Maine Indian Tribal-State Commission (MITSC) has no regulatory role regarding saltwater fisheries and nothing in law requires consultation with MITSC prior to the Legislature taking any action. MITSC was created by and is part of the State Implementing Act. 30 M.R.S. § 6212. MITSC does have authority to promulgate fishing regulations for certain *inland* ponds, streams or rivers where a requisite amount of the shoreline is within Indian Territories, but it has no authority over marine resources or shellfish *Id.* at § 6207(3) & (9). The law requires the Commissioner of Inland Fisheries and Wildlife to consult with MITSC when the Commissioner believes that MITSC's own regulations may be harming *inland* fisheries but there is no such requirement regarding marine resources because MITSC has no jurisdiction over marine resources. *Id.* at § 6207(6). MITSC may *consult* with the Commissioner of Inland Fisheries and Wildlife "and the Legislature with respect to implementation of fish and wildlife management policies on non-Indian lands in order to protect fish and wildlife stocks on lands and water subject to regulation by the Passamaquoddy Tribe, the Penobscot Nation or [MITSC]." *Id.* at § 6207(8). But this permissive "consultation" has nothing to do with marine resources or coastal waters. *Id.* at § 6207(9). Moreover, while this provision authorizes MITSC to make recommendations to the Legislature, it in no way limits the constitutional authority of the Legislature to act without such a recommendation.

Treaty of Watertown


The Treaty of Watertown, signed by the Governors of the State of Massachusetts Bay and the Delegates of the St. John's and Mi'kmaq Tribes of Indians in 1776, was a profession "of Alliance and Friendship," and included an agreement for the provision of soldiers by those Tribes. This Treaty, which was superseded by the Settlement Acts of 1980, does not address saltwater fishing matters and has no relevance to these issues.

Conclusion

Nothing in the Maine Settlement Acts or in other state or federal law limits the jurisdiction of the Maine Legislature to address the marine resource issues presented in the pending legislation. The committee of jurisdiction should follow all normal procedures in reviewing legislation regarding marine resources. Although the Legislature has voluntarily granted certain privileges to tribes in saltwater fisheries licensing, these provisions are not required by the Settlement Acts and the Legislature is free to change them.

Please let me know if this office can be of further assistance.

Respectfully,


JANET T. MILLS
Attorney General

Cc: Governor Paul R. LePage
Senate President Justin L. Alfond
House Speaker Mark W. Eves
Senator Christopher K. Johnson
Representative Walter A. Kumiega III
Representative Henry J. Bear
Representative Wayne T. Mitchell
Representative Madonna M. Soctomah
MITSC